IN THE

Supreme Court of the United States

October Term, 1978
No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

vs.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY, GROUP, LTD.,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 6, 1978, be denied.

QUESTIONS PRESENTED.

1. In a Warsaw Convention case, where the ticket was purchased in the United States, does the U.S. District Court have subject matter jurisdiction pursuant to 28 USC §1331, as a matter "arising under" a treaty of the United States?

2. Does Article 28(1) of the Warsaw Convention expressly provide for subject matter jurisdiction in the international or treaty sense?

3. Is the fundamental objective of the Warsaw Convention to provide an international system of liability and litigation rules, and if so, have causes of action thereunder been stated?

4. Does Article 17 create a cause of action for wrongful death?

ADDITIONAL TREATY PROVISIONS INVOLVED.

CHAPTER III. Liability of the Carrier

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

STATEMENT OF THE CASE.

A. The Facts.

Abraham Benjamins, and his wife, Hilde, were both permanent resident aliens domiciled in California. Hilde Benjamins purchased passenger tickets for the fatal British European Airlines (hereinafter BEA) flight in question in Los Angeles, which provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention. The point of departure and destination within the meaning of the Treaty, as provided in the tickets, was Los Angeles, California. On April 17, 1974, Respondent, as personal representative of the estate of Hilde Benjamins, deceased, for the benefit of himself and his two children, filed a complaint for wrongful death and conscious pain and suffering, against petitioner BEA, and respondent,

Hawker Siddeley Aviation, Ltd., and Hawker Siddeley Group, Ltd., arising out of the worst air disaster in British aviation history. All 112 fare-paying passengers, including plaintiff's decedent, and six crew members, died when the BEA owned and operated jet aircraft crashed on June 18, 1972, shortly after take-off.

B. Proceedings in the Court Below.

1. The District Court:

Referring to the uncorrected version of the District Court's oral opinion, petitioner has not quite accurately reflected the Court's view. The opinion, corrected pursuant to respondent's motion, is printed herein in the Appendix at pp. 1a-11a. The Court referred to the opinions in favor of Respondents' position found in *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858 (1964), and *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). Judge Weinstein realized the need for a new evaluation of the questions presented and stated:

> "This Court believes it is bound by the *dicta* in the *Noel v. Aeropostal Venezolana* 247 F.2d 677 (2d Cir. 1957). . . . This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions." (emphasis added).
>
> Brief in Opposition, Appendix p. 2a.

2. The Court of Appeals:

On appeal of the dismissal of the Second Amended Complaint, the Second Circuit Court of Appeals upheld

the internationally acknowledged view that Article 17 created a cause of action, and therefore, that jurisdiction properly vested in the District Court under 28 USC §1331. The Second Circuit panel denied petitioner's Petition for Rehearing. The entire Second Circuit followed suit in rejecting the Petition for Rehearing en banc without any, "active judge or judge who was a member of the panel having suggested that a vote be taken on said suggestion." *Benjamins y. BEA*, 572 F.2d 913 (1978); Petition, Appendix 2a.

The Second Circuit held that Article 17 of the Warsaw Convention creates a cause of action.

> "[T]he desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

The inconsistency of prior rulings on the questions raised by respondent with the spirit and purpose of the Warsaw Convention was of great concern to the Court. *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix 12a. The decision below reaches the conclusion that more certain availability of the federal forum in Convention litigation would promote uniform development of Convention law and treatment of Warsaw Convention Cases, and thus obviate the "jungle-like chaos" which otherwise results (*Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977)); only thus are the objectives of the Convention truly met. *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix 15a.

REASONS FOR DENYING THE WRIT.

A. The Second Circuit Court of Appeals Decision Herein Is Based Upon a Thorough, Thoughtful and Careful Review and Analysis of Warsaw Convention Law and Policy, Both Domestic and International.

The view that the Convention did not create a cause of action was attributable to two cases decided in the 1950's. *Komlos v. Campagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953), cert. denied, 348 U.S. 819 (1954), and *Noel v. Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907, 78 S.Ct. 344, 2 L.Ed. 2d 262 (1957). District Court Judge Jack Weinstein urged the Court to reconsider these rulings, finding them lacking in "full consideration and analysis". Brief in Opposition, Appendix p. 3a. Circuit Judge Lombard, author of both *Noel* and *Benjamins* confessed the *Noel* analysis to be insubstantial and undertook a complete review.

Finding no executive imprimatur, the Court of Appeals dismissed *Noel's* excessive reliance and questionable interpretation of an isolated statement from Secretary Hull's letter to President Roosevelt. (Reprinted in full, Brief in Opposition, Appendix pp. 6a-11a)

> "We do not believe that the passing remark of Secretary Hull in a lengthly letter was intended to state the total of what Article 17 might provide. . . ."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Hull had said,

> "The *effect* of Article 17 is to create a presumption against the aerial carrier *subject to certain*

defenses on the happening of an accident." (emphasis added) Brief in Opposition, Appendix p. 10a.

He analogized this to the doctrine of *res ipsa loquitur*, an evidentiary presumption, to explain the operation of the "presumption in favor of the passenger, lightening the would-be plaintiff's burden of proof", in light of the Convention's compromise to limit carrier damages.

> "It will be observed that while under the terms of the Convention, passengers and shippers require certain definite rights in international air transportation, the aerial carriers obtain the benefits of a limitation of liability."
>
> Brief in Opposition, Appendix p. 10a.

This discussion illustrated for the President the interrelationships of the provision designed to effect the purposes of the treaty as a whole, which were, and *are*, to alleviate:

> "the chaotic conditions which now confront American international air-transport operators with respect to matters coming within the purview of the Convention."
>
> Brief in Opposition, Appendix p. 11a.

The Court of Appeals adopted Secretary Hull's view of the Convention's purpose:

> "We do, on the other hand, believe that the desirability of uniformity in international air law can best be recognised by holding that the Convention; otherwise universally applicable, is also the universal source of a right of action."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Recent authority was of paramount concern to the Court of Appeals. After a thorough review of case law since *Noel* it concluded:

> "[n]o case law since 1962 has demonstrated that the source of carrier liability lies anywhere but in the convention."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Recent law is also moving away from *Noel*. The Second Circuit decision, *Reed v. Wiser,* 555 F.2d 1079, cert. denied, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed. 2d 279 (1977) was "significant new authority", raising substantial inconsistency requiring reconciliation within the Circuit. *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix p. 10a. Additionally, the Warsaw Treaty itself is not a static document.

> "The Warsaw Convention is not a treaty that has mouldered on the books. It has had agonizing reappraisal by the Executive and Legislative branches. . . ."

G. Nathan Calkins, Jr. Esq., Chairman of the United States Delegation to The Hague Conference to amend the Warsaw Convention, provided further analysis in support of the Court's position. *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix p. 11a. The creation of the Judicial Panel on Multi-District Litigation and procedures in the Manual for Complex Litigation lent also telling modern support for the reasonableness of the Court of Appeals decision.

Most "compelling" to the Court was evidence of interpretation by other signators of the Convention, not considered in *Noel*. The effect of the *Benjamins* decision is merely to bring the Second Circuit into

accord with world-wide interpretation that Article 17 of the Warsaw Convention created a cause of action against the carriers and in favor of passengers or their personal representatives.[1]

> "The clearest picture . . . [was] . . . in other common-law jurisdictions."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix p. 14a.

The United Kingdom, Canada and Australia have also enacted legislation providing that in any action covered by the Convention it, and it alone is the source of *liability* in substitution for any other liability of the carrier under "any statute or common law".[2]

> *Benjamins v. BEA, supra,* 572 F.2d 919; Petition, Appendix p. 14a.

The Court of Appeals at the same time moved into line with current United States interpretation of other provisions of the Convention. The Circuits are in agreement that Article 18 of the Convention creates a cause of action, and the *Benjamins* decision cites, with approval,[3] the following:

> "[T]he most reasonable interpretation is that Article 18 and 30(3) create a cause of action.

[1]For Example: Italy: Italian Navigation Act of 1924 (1924); Revue Juridique de la Locomotion Aeriennes 51, Art. 39 §2. Brazil: Brazilian Air Code (1938) Ch.V. Chile: Hamilton, Manuel de Derecho Aereo, p. 449 (1950). France: Juglart, Traite Elementaire de Droit Aerien, p. 240 (1952). Mexico: Rigalt, Principios de Derecho Aereo, p. 124 §66 (1930).

[2]England: Carriage by Air Act (1923) 22 and 32 Geo. 5, c.36, §1(4), reenacted, 9 and 10 Eliz.2, c.27. Canada: Carriage by Air Act (1939) 3 Geo.6, c.12.

[3]*Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix p. 13a.

> [It] gives a passenger whose baggage is lost a right of action to enforce that liability. *Seth's* action, therefore, seems clearly to be arising under a treaty of the United States." *Seth v. British Overseas Airways Corp.* (1964) (1st Cir.), cert. denied, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61.

The *Benjamins* Court concluded,

> "At the time the United States adhered to the Convention, it seemed obvious to all that the Convention created causes of action for wrongful death or personal injury (Article 17), and for damages to baggage (Article 18). One Court went so far as to say *'If the convention did not create a cause of action in Article 17, it is difficult to understand just what Article 17 did do.' Salamon v. Koninklijke Luchtvaart Maatschappij N.V.*, 107 N.Y.S. 2d 768, 773 (S.Ct. 1951), aff'd mem., 281 App. Div. 965, 120 NY.S. 2d 917 (1st Dept.)" (emphasis added).
>
> *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix 9a.

B. The Decision Below Provides a Basis for Consistent and Uniform Application of the Warsaw Convention, Implements the Stated Purposes and Objectives of the Treaty, and Thus Avoids the "Jungle-Like Chaos" Differing Interpretations Would Encourage in International Air Disaster Litigation.

Benjamins resolved inherent difficulties arising within the Second Circuit and between the Second Circuit and other accepted American interpretations. An opposite result in *Benjamins* would have led to inherent difficulty with the unchallenged conclusion of *Smith*

v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971), that the Warsaw Convention was a true self-executing treaty. It also resolved a potentially serious conflict with the accepted view in *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858 (1964), preventing the otherwise absurd result that District Courts had jurisdiction over minuscule claims involving baggage, but not major claims involving personal injury and death. Additionally, a new intra-circuit conflict had arisen, of which the Second Circuit felt obliged to take cognizance. See *Reed v. Wiser, supra*, 555 F.2d 1079 at 1092.

> "We indicated—without addressing the question in the instant case—that the '*Convention was intended to act as an internationally uniform law* and that the substantive law of the Convention was binding on the forum."
>
> *Benjamins v. BEA*, 572 F.2d 917; Petition, Appendix p. 11a.

To reconcile internal views and promote a clear understanding of the Convention, the Court announced:

> "[T]he time has come to examine the question whether our view of the Convention as an internationally binding body of uniform air law permits us *any longer* to deny that a cause of action may be founded on the Convention itself rather than on any domestic law." (citations omitted).
>
> *Benjamins v. BEA, supra*, 572 F.2d at 917; Petition, Appendix p. 11a.

In the field of Warsaw Convention interpretation, the Second Circuit has been a leader. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention* (1967) 80 Harv. L.Rev. 497, 519. When

it appears that, as a result of future cases in the Courts of Appeals, the conflict, if any, will be resolved, the Supreme Court should refrain from premature intervention. Mr. Justice Harlan, "*Some aspects of the judicial process in the Supreme Court of the United States,*" 33 Australian Law Journal 108 (1959). In the light of the likelihood of reconciliation, the *Benjamins* decision has not created a square, irreconcilable conflict of the sort requiring Supreme Court review. Stern, *Denial of Certiorari Despite a Conflict* (1953) 66 Harv. L.R. 465.

C. There Is No Need for the Supreme Court to Decide This Case.

Petitioner has raised the spectre of a multitude of small cases pouring into the Federal Courts due to a release of the controls by the Second Circuit. It ignores not only the expressed concern of the Second Circuit, ". . . in reducing expenses, expediting dispositions, and benefiting all parties to air-crash disasters", *Benjamins v. BEA, supra*, 572 F.2d at 919; Petition, Appendix p. 16a, but the realities of Convention law as it existed prior to the *Benjamins* ruling. Realistically, only baggage is a potential source of minor claims in aircraft disaster litigation. *Seth v. British Airways, Ltd., supra.* Where personal injury or death, within the purview of Article 17, are involved, damages are of substantial magnitude and, if not, are generally settled within the limits of liability, which is absolute since the execution of the Montreal Agreement, 60 Stats. 1499. The substantial cost of litigation is a self-limiting factor to the bringing of small injury cases in international airline disaster cases.

There is no evidence, and the court so found, that *Benjamins* would increase the volume of litigation. Nor does *Benjamins* conflict with legislation currently pending before Congress. H.R. 9622, 95th Cong., 2d Session (1978), *Abolition of Diversity of Citizenship Jurisdiction*, is designed to achieve a reduction of case-load in the federal courts, but its primary purpose is to bring about:

> "a proper jurisdictional balance between the federal and state court systems in the light of basic principles of federalism."
>
> Report: *Abolition of Diversity of Citizenship Jurisdiction*, House of Representatives, 95th Congress, 2d Session, No. 95-893.

Establishing a rational basis of jurisdiction, rather than the mere amount in controversy, is the underlying goal of the legislation. Powe's testimony, cited by Petitioner, does not even refer to burdensome workload, but raises concerns which may, of themselves, increase the burden of the federal courts. *Diversity of Citizenship Jurisdiction/Magistrates Reform, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary*, House of Representatives, 95th Cong., 1st Session, Serial No. 21.

Congressional statistics reinforce the Court of Appeals conclusion that few cases, if any, will be added to the federal rolls by the *Benjamins* ruling. In the year commencing July 1, 1976 and ending June 30, 1977, a total of 605 cases involved any sort of personal injury in airplanes out of a total of 31,678 diversity cases—less than 2%. *Hearings, supra*, p. 361. Even if all Warsaw Convention cases

were to become federal question cases, the number would be *de minimis*.[4] On the other hand, with Multi-District Litigation Procedures, *Benjamins* probably will add nothing at all to the federal case load.

CONCLUSION.

Because the Court of Appeals, Second Circuit, has ruled correctly in *Benjamins v. BEA*, 572 F.2d 913 (1978), and because *Benjamins* reconciles intra-circuit conflict, brings American opinion into accord with international aviation law and establishes a likelihood of rapid resolution of any potential inter-circuit conflict, respondent respectfully submits that the Supreme Court should deny the petition for a writ of certiorari.

Dated: August 24, 1978.

RONALD L. M. GOLDMAN & ASSOCIATES,
Counsel for Respondent.

[4]The Committee's Statistics do not differentiate between Warsaw Convention Cases and the many other different types of aviation accident cases. For example: Domestic airline cases, general aviation cases, aviation accidents wherein allegations of Federal Air Traffic Control negligence are asserted, etc.

APPENDIX.

United States District Court, Eastern District of New York.

Abraham Benjamins, as Personal Representative of the Estate of Hilde Benjamins, deceased, Plaintiffs, against British European Airways, Hawker Siddeley Aviation, Ltd., and Hawker Siddeley Group, Ltd., Defendants. 73 C 341, MDL No. 147, 74 C 590.

Filed Mar. 4, 1977.

United States Courthouse, Brooklyn, New York, February 23, 1977 10:00 o'clock A.M.

Before: HONORABLE JACK B. WEINSTEIN, U.S.D.J.

Emmanuel Karr, Official Court Reporter

(Following discussion between the parties, Judge Weinstein made the following statement.)

THE COURT: Plaintiff contends that the Warsaw Treaty establishes an independent right of action or a claim for relief for purposes of Federal jurisdiction.

There is a suggestion in Smith versus Canadian Pacific Airways Limited, 452 F 2nd, 798, a Second Circuit 1971 case, indicating a substantial basis for this contention.

See also G. Nathan Hawkins, Jr., "the Cause of Action Under the Warsaw Convention," 26 Journal of Air Law and Commerce 323 (1959).

There is also support for the position in the First Circuit, Seth versus British Overseas Airways Corporation, 329 F 2nd 202, First Circuit 1964.

This Court believes it is bound by the dicta in Noel versus Linea Aeropostal Venezolona 247 F. 2nd 677, Second Circuit, 1957.

See also Husserl versus Swiss Air Transport Co., Ltd., 351 Supp. 702, 706, a Southern District of New York 1972 case, affirmed without opinion essentially for the reasons set forth by Judge Tyler in a well-considered opinion, Greca Husserl versus Swiss Air Transport Co., 485 F. 2nd, 1240, a Second Circuit 1973 case.

This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions.

The case of Abraham Benjamins, as Personal Representative of the Estate of Hilda Benjamins, Deceased, is dismissed.

Take it up and see what you can do with it.

MR. GOLDMAN: Is that against all parties?

THE COURT: Yes, against all the parties.

I'm not going to bother writing on it because I don't think it is necessary.

(Discussion was then held off the record.)

THE COURT: The motion of plaintiff Benjamins to amend the complaint to allege a baggage claim is also dismissed. The amount claimed is $1,000, this is less than the $10,000 required, since the Court finds that the pendent jurisdiction claims may not be aggregated for the purpose of providing a Federal issue basis for jurisdiction.

MR. GOLDMAN: I believe what you said was that the motion for the claim was dismissed, but what I'm asking for is a ruling granting our motion to file the amended complaint.

THE COURT: That is granted.

MR. GOLDMAN: Then there is the Order of Dismissal on the jurisdictional ground?

THE COURT: Yes.

MR. GOLDMAN: All right.

MR. FINNERTY: Your Honor, on behalf of the defendants and in regard to the second motion to serve a second amended complaint filed by the plaintiff Benjamins, it is our position that such a course of action would be barred under the statute of limitations and that the relationship-back theory mentioned by plaintiff is not applicable to that type of cause of action, so that therefore in addition to any other arguments I have raised before your Honor today and decided by your Honor, we also claim that that cause of action would be barred under the statute of limitation.

THE COURT: The Court does not rule on that issue it is not necessary to make that ruling.

If the case is remanded on the grounds that the ..... is jurisdiction, then the Court will have to consider the issue of fairness, notice and the like, and in deciding whether there should be a relationship back, information sufficient to make such a ruling is not before the Court and may have to be established by further discovery.

All right, gentlemen.

(There was further discussion off the record.)

THE COURT: With respect to the testimony before the British hearing, I ma not going to take the testimony before the British hearing, either of live witnesses or deposed witnesses, whichever is preferable, yet the testimony at the British hearing can be used for impeachment purposes, but if there is a witness who cannot now be deposed, that is produced as a live witness, I will take that testimony under 803(4) or 803(5), upon giving appropriate notice.

The next question is whether the manufacturer has the advantage of the Warsaw Convention.

MR. FINNERTY: That is withdrawn, your Honor, as moot.

THE COURT: I don't believe it has been.

MR. FINNERTY: Well, can we have a ruling on that?

THE COURT: The Court makes no ruling on that issue.

Law Library, Judge Advocate General, Navy Department.

1934

United States Aviation Reports

Tempus fugit; tempore fugit homo

Editors: Arnold W. Knauth, New York; Henry G. Hotchkiss, New York; Emory H. Niles, Baltimore.

1934 USAvR

Baltimore: United States Aviation Reports, Inc. 1934

Accompaniments: Report of the Secretary of State, with accompanying convention and protocol.

THE WHITE HOUSE.

The PRESIDENT:

The undersigned, the Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate to receive the advice and consent of that body to adherence thereto on the part of the United States, if his judgment approve thereof, subject to the conditions mentioned in the succeeding two paragraphs of this report, the convention for the Unification of Certain Rules Relating to International Transportation by air, signed by the representatives of 23 countries at Warsaw, Poland, on October 12, 1929, during the Second International Conference on Private Aerial Law, and an additional protocol to the convention relating to article 2 thereof.

It is provided in article 1 of the Convention that the Convention shall apply to international transportation of persons, baggage, or goods performed by aircraft for hire or to gratuitous transportation performed by an air-transportation enterprise. It is provided further in the first paragraph of article 2 that the Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided the transportation falls within the conditions laid down in article 1. However, it is provided in the additional protocol to the Convention that the High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of the Convention shall not apply to international transportation by air performed directly by the State, its colonies, protectorates, or mandated territories or by any other territory under its sovereignty, suzerainty, or authority. It is

recommended that the Senate be asked to give its advice and consent to adherence to the Convention on the part of the United States subject to a declaration to be made on behalf of the Government of the United States in its instrument of adherence that the first paragraph of article 2 of the convention shall not apply to international transportation that may be performed by the United States or any Territory or possession under its jurisdiction.

Through an inadvertence, the words "du transporteur" (from the carrier), were used in the first paragraph of article 15 of the French text of the Convention at the time of its adoption and signature, where the word "de l'expéditeur" (from the consignor) should have been employed. The Polish Government as the depositary of the signed Convention has taken steps to have the interested governments agree to the substitution of the words "de l'expéditeur" for the words "du transporteur." It is recommended, therefore, that should the Senate give its advice and consent to adherence to the Convention on the part of the United States it do so with the understanding that the French text of the first paragraph of article 15 shall be amended by the substitution therein of the words "de l'expéditeur" for the words "du transporteur" in the fourth line of the paragraph, so that the words "consignor" can be substituted for the word "carrier" where it now appears in the English translation of the phrase "du transporteur."

This Convention constitutes the first of a series of conventions on various subjects of private aerial law which have resulted or will result from the deliberations of the International Technical Committee of Aerial Legal Experts, an international organization engaged

in the preparation of a code of private air law through the adoption of draft conventions on which final action is taken at general international conferences called for the purpose of considering the drafts.

The Convention signed at Warsaw on October 12, 1929, applies only to international transportation by air and includes provisions relating to the transportation of persons, baggage, and merchandise.

Chapter II of the Convention contains detailed provisions in regard to the form and legal effect of passenger tickets, baggage, checks, and aerial waybills to be used in international transportation by air. It is obviously an advantage to passengers, shippers, and aerial carriers to have international uniformity with respect to transportation documents required in international air transportation.

Chapter III contains important provisions in regard to the liability of aerial carriers for damages sustained in the event of the injury or death of passengers or of the destruction or loss of or damage to baggage or merchandise.

According to article 22 (ch. III) of the convention, the liability of the aerial carrier for damages is limited to the following amounts: 125,000 gold francs for each passenger; 250 gold francs per kilogram for checked baggage and goods, unless there is a special declaration of value made by the consignor and an additional sum paid by him if the case so requires; and 5,000 gold francs for objects taken care of by the passenger himself. It is provided in article 22 that a higher limitation of liability with respect to the transportation of passengers than that stipulated

in the Convention may be agreed to between the carrier and the passenger.

It is provided in article 25 (ch. III) that the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability if the damage is caused by his willful misconduct.

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

It is provided in article 20 (ch. III) of the Convention that in the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. This provision is analogous to the rule of maritime law under which the owner of a vessel who exercises due diligence to make the vessel seaworthy and to have it properly manned, equipped, and supplied is not liable for damage resulting from faults or errors in navigation or in the management of the vessel. In view of the difficulties of international air transportation which involves navigation under uncertain atmospheric conditions over land

and sea it is believed to be reasonable to apply this principle of maritime law to the navigation of aircraft.

Article 23 (ch. III) of the Convention provides in effect that any stipulation in a contract of carriage tending to relieve the carrier of liability or to fix a lower limit than that laid down in the Convention shall be void.

The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

Under article 19 (ch. III) the aerial carrier is liable for damages occasioned by delay in the transportation by air of passengers, baggage, or goods, subject to certain defenses established by the Convention. In this

respect the Convention appears to accord to passengers and shippers broader rights than they are generally entitled to with regard to other forms of transportation.

It will be observed that while under the terms of the Convention passengers and shippers require certain definite rights in international air transportation, the aerial carriers obtain the benefit of a limitation of liability.

The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention.

This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention.

The National Advisory Committee for Aeronautics also had this Convention under consideration and passed a resolution favoring adherence thereto on behalf of the Government of the United States.

I may add that in a communication received from the Aeronautical Chamber of Commerce of America, Inc., New York City, it was stated that after a thorough study of the provisions of the Convention the chamber was of the opinion that the Government of the United States should adhere to the Convention, thus alleviating the chaotic conditions which now confront American international air-transport operators and the public with respect to matters coming within the purview of the Convention.

The Convention has been ratified by and is therefore in force as to Spain, Brazil, Rumania, Yugoslavia, Poland, France, Latvia, Great Britain, Italy, the Netherlands, and Germany.[1] Mexico, a nonsignatory power, is a party to the Convention by adherence. It will thus be seen that the Convention is already applicable to a large percentage of air transportation conducted on an international basis.

Respectfully submitted,

CORDELL HULL.

Accompaniments: Convention and protocol as above.

DEPARTMENT OF STATE,

Washington, March 31, 1934.

[1]Switzerland and Liechtenstein have since ratified the treaty.